IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 886

STATE OF ALASKA; ROBERT ALLEN VENABLE, executor of the will and estate of R. H. Venable, deceased; and D. D. HARRINGTON,

Petitioners,

vs.

UNITED STATES OF AMERICA, ALASKA EXPLORATION CORPORATION,

Respondents.

SUPPLEMENTAL MEMORANDUM OF PETITIONERS

By Order of Court entered October 12, 1970, the parties were requested to file further memoranda concerning certain specified questions. Petitioners respond to those questions in the order posed.

(1) MUST CONGRESS AUTHORIZE OR RATIFY THE WITHDRAWAL OF TERRITORIAL LANDS BY THE PRESIDENT?

Yes. "Section 3 of Article 4 of the Constitution confers upon Congress exclusively 'the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' " *Sioux Tribe of Indians v. United States*, 316 US 317, 324; See also *United States v. Midwest Oil Co.*, 236 US 459; *Wisconsin C. R. Co. v. Price County*, 133 US 496, 504; *Gibson v. Chouteau*, 13 Wall. (US) 92, 99.

The power may be expressly delegated to the Executive or the Executive may be granted the power by implication. In addition, the Executive may exercise the power, subject to ratification by the Senate, by virtue of his employment of the treaty power. On the other hand, no provision of the Constitution and no decision of this Court supports the proposition that the Executive has independent or inherent authority to withdraw lands within a territory.

The language of Article IV, Section 3 of the Constitution does not differentiate between "the territory or other property belonging to the United States" which lies within a state and similar property which lies in a territory or other national possession. Furthermore, the decisions of this Court make no such distinction.

The Organic Act organizing Alaska as a territory provided that the Constitution and laws of the United States would be generally applicable in the territory, and specifically prohibited the territorial legislature from passing laws "interfering with the primary disposal of the soil." (Act of August 24, 1912, 37 Stat. 512, Sections 3 and 9).

(2) DID EXECUTIVE ORDER NO. 8979 HAVE THE NECESSARY AUTHORIZATION OR RATIFICATION?

No - to the extent it may have attempted to withdraw the lands lying beneath the navigable waters of Tustumena Lake. It is important to bear in mind that this litigation concerns title to only the lands lying beneath an inland navigable waterbody, and that the questions posed by the Court's October 12, 1970 Order are somewhat broader in that they also appear to concern uplands.

As stated above, the authority of the Executive to withdraw land may arise because of express or implied delegation by the Congress, or by virtue of the exercise of the

treaty power and ratification by the Senate. The latter method is not in issue here.

Of the considerable number of statutes granting express authority to the President to make withdrawals of land for various purposes, only one, the Pickett Act, has any possible application to Executive Order No. 8979, but it is clear that it was not, in fact, the basis for the promulgation of that Order. The Pickett Act (Act of June 25, 1910; 36 Stat. 847, 43 USC 141 et. seq.) authorizes the President to make temporary withdrawals of public lands of the United States for enumerated purposes not applicable here, and for other public purposes. Unlike typical orders of withdrawal made under the authority of the Pickett Act, Executive Order No. 8979 does not refer to the Act. Further, a withdrawal under the authority of the Pickett Act may not preclude the making of locations for metalliferous minerals under the general mining laws (as amended August 24, 1912, 37 Stat. 497). Executive Order No. 8979 states no such exception.

More importantly, withdrawals under the Pickett Act are "temporary" and are not intended to constitute a permanent dedication of the land to a particular purpose. If the withdrawal were a temporary withdrawal under the authority of that Act, it cannot be said that it was the intention of the President permanently to withhold title to the bed of Tustemena Lake from the State of Alaska. It would, at most, constitute a form of encumbrance upon the lands, legal title to which would pass at statehood. The United States has not urged such a proposition.

Finally, the Pickett Act withdrawals apply only to "public lands of the United States." "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*,

92 US 761; See also *Ivanhoe Min. Co. v. Keystone Consol. Min. Co.*, 102 US 167; *Leavenworth, L. & G. R. Co. v. United States*, 92 US 733; *Dootan v. Carr*, 125 US 618; Senate Report No. 857 to accompany H. R. 5538, 85th Congress – Second Session, quoted in 1958 U. S. Code Congressional and Administrative News at page 2233. Certainly lands beneath inland navigable waters, as well as tidelands, are not ordinary public lands. *Shively v. Bowlby*, 152 US 1. Further, tidelands and lands beneath inland navigable waters were specifically removed from the operation of certain disposal laws by the Act of May 14, 1898 (30 Stat. 409, 48 USC § 411) which statutorily adopted the doctrine that such lands were reserved for the future State of Alaska.

Executive Order No. 8979 may be viewed differently if it is claimed to have been made under a power to withdraw *impliedly* granted to the President by the Congress under the theory expressed in *Midwest Oil Co.*, supra. Petitioners do not contend that Executive Order No. 8979 is invalid in its entirety for lack of authority in the President to make such a withdrawal. Under the implied authority to make withdrawals of public lands, the President might validly withdraw uplands and lands beneath non-navigable waters for the creation of the Kenai National Moose Range. See *Midwest Oil Co. v. United States*, supra.; *Udall v. Tallman*, 380 US 1. Executive Order No. 8979, however, described only the outer perimeter of the area to be withdrawn and then provided a number of exceptions for areas within that perimeter. Clearly the Order does not purport to withdraw everything within that perimeter. Among the exceptions are "any lands within the described area that are otherwise withdrawn or reserved." Petitioners have urged, in the first instance, that there was no intention to withdraw the bed of Tustumena Lake, inasmuch as it was reserved for the future State of Alaska.

Even if such an intention can be supplied after the fact (as the United States apparently persuaded the Court of Appeals could be done) the President could not validly make such a withdrawal so as to prevent title from passing to the State of Alaska under the theory espoused by the United States. Neither the express authority of the Pickett Act nor any implied authority of the President to withdraw land from entry or sale has been held to carry with it the power to dispose of the land, i.e., to permanently sever it from the public domain. The authority to create Indian reservations by executive order was found not to authorize vesting the Indians, for whose benefit they were made, with any compensible interest in the land, and the reservations were terminable at the will of the government. *Sioux Tribe of Indians v. United States, supra.*, at 331. The granting of oil and gas leases was held not to be a "disposition" in *Udall v. Tallman*, supra., at 20, which distinguished that term from other words which implied permanent conveyance of title. Yet the United States has equated Executive Order No. 8979 with a disposition of the public domain, equivalent to a grant. (Brief for the United States In Opposition, p.5. The United States has misconceived Petitioners' position. Petitioners have argued that the Executive could neither withdraw nor grant the land in question except in certain limited circumstances.)

It is Petitioners' position, as expressed in the Petition originally filed herein, that this court has long recognized that lands beneath inland navigable waters are to be distinguished from ordinary lands within a state or territory and that, unlike ordinary uplands, ownership of lands beneath navigable waters is one of the attributes of sovereignty. *U. S. v. Texas*, 339 U. S. 707, 716-717. During territorial status, the United States holds the lands in trust for the future state, disposing of them only when necessary for certain limited purposes, *Shively v. Bowlby*,

152 U. S. 1, and only by making its intention to do so very plain, U. S. *v Holt State Bank*, 270 U. S. 49.

When Alaska entered the Union on an equal footing with the other states, it acquired certain property rights by virtue of its newly acquired sovereignty. While "equal footing" does not require economic equality;

"Yet the 'equal footing' clause has long been held to have a direct effect on certain property rights. Thus the question early arose in controversies between the Federal Government and States as to the ownership of the shores of navigable waters and the soils under them. It was consistently held that to deny to States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States but reserved them to themselves." (citing cases.) *(U. S. v. Texas*, Supra. at 716.)

Prior to statehood, the United States owns or controls all of the land in a territory, including lands beneath navigable waters. It may generally dispose of the public lands as it sees fit. Lands beneath navigable waters, however, being of a special governmental nature, are held in *trust* for the future states. Notwithstanding the trust status of such lands, Congress does have the power to make grants of lands beneath navigable waters under certain circumstances. This concept was first announced, by way of dicta, in *Shively v. Bowlby*, supra., at 48 as follows:

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do in order to perform international obligations, or to effect the improvements of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory."

Shively v. Bowlby, enunciates a theory by which Congress may dispose of lands beneath navigable waters prior to statehood. When the United States does effect a disposal of such lands, it has necessarily put it beyond its own power subsequently to pass title to those lands to the territory when the territory becomes a state. In this case there has been no grant to a third party and no reservation in favor of the third party. At most the United States has attempted to withdraw or reserve for itself. [1]

It should be borne in mind that the purpose of a withdrawal is to prevent some other disposition of the withdrawn land, which might be effected pursuant to the various public land laws such as the homestead laws. Where, as here, the land in question was not subject to the public land laws in the first place, the President should not be deemed to have attempted a meaningless act by including the lands beneath Tustumena Lake within the purview of his order.

If the limitations of *Shively v. Bowlby*, are meaningful, Congress itself could not have deprived the State of Alaska of title to the bed of Tustumena Lake and, of course, could not expressly or impliedly delegate the power to the Executive. Therefore, the President was without authority to withhold the lands from the State of Alaska and, if he attempted to do so, his order was ineffective to that extent.

Even, as the United States has contended, there is no restriction on the nature of the public purpose for which *Congress* may *grant* lands beneath inland waters prior to

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1. A similar issue is raised in *United States of America v. City of Anchorage, et al, No. 25011* and *Fish and Farm Products, Inc., et al v. City of Anchorage, et al No. 25029*, relating to tidelands within the City of Anchorage, which actions are awaiting decision in the United States Court of Appeals for the 9th Circuit.

statehood, Executive Order No. 8979 was ineffective as to the lands beneath Tustumena Lake because it was neither an act of the Congress nor a grant to another person.

If, as the United States has argued, Executive Order No. 8979 is to be construed as a grant, it must fail as to the lands beneath Tustumena Lake because the President had no authority to make such a grant.

If Executive Order 8979 is construed simply as a withdrawal, its purpose was to withhold from private entry those lands which were subject to private entry, and it must have been made upon the basis of an implied power; Petitioners have found no case in which the implied power to withdraw lands has extended to a withholding of title from a newly created state.

(3) WAS THIS MATTER ADEQUATELY RAISED BELOW?

The broad first question posed by the October 12, 1970, Order of the Court was not raised below. None of the parties have contended that the President lacked the authority to withdraw uplands, including lands beneath *non-navigable* waters, for the purposes stated in Executive Order No. 8979. Petitioners did raise below, and the United States defended, the issue of whether the Congress was required to, and did, authorize or ratify the purported act of the Executive in issuing Executive Order No. 8979, to the extent it may have applied to lands underlying Tustumena Lake.

Respectfully submitted,

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November, 1970